No. 11,766

United States Circuit Court of Appeals

FOR THE NINTH CIRCUIT

BURNHAM CHEMICAL COMPANY,
Appellant

vs.

BORAX CONSOLIDATED, LTD., PACIFIC COAST BORAX COMPANY, UNITED STATES BORAX COMPANY, and AMERICAN POTASH & CHEMICAL CORPORATION,
Appellees.

BRIEF ON BEHALF OF APPELLEE AMERICAN POTASH & CHEMICAL CORPORATION

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STATEMENT

This is an appeal from a judgment dismissing the complaint, entered in the District Court of the United States for the Northern District of California, Southern Division, on May 9, 1947 (R. 199-200).* The action was brought under Section 4 of the Clayton Act (U. S. C. Title 15 Section 15) for damages alleged to have been sustained by plaintiff as a result of a conspiracy by defendants in violation of the antitrust laws of the United States. The complaint alleged a conspiracy and overt acts of the defendants, or some of them, in 1925 and 1928 which caused it damage. This action was not brought until July 3, 1946.

The defendants moved to dismiss the action as barred by the three-year California statute of limitations, Section 338(1) of the Code of Civil Procedure. Affidavits were filed in support thereof (R. 76, 108-121, 163-180). After preliminary argument, the motions were, by direction of the court and stipulation of the parties, treated not only as motions

*R.—refers to printed Transcript of Record.
Br.—refers to Appellant's brief.
For convenience appellant is referred to as "plaintiff" and appellees as "defendants".

to dismiss but also as motions for summary judgment, and further affidavits were filed (R. 105-107, 121-163, 180-182).

After argument on the motions, the District Court, while reserving decision on the motions to dismiss, stated that it felt compelled to deny the motion for summary judgment although "it would appear from the record here, that plaintiff may have great difficulty in producing credible evidence to defeat the defense of limitations" (R. 184).

The court ordered the defendants to file "Special answers, setting up the defense of the Statute of Limitations," which the defendants did. The plaintiff demanded a jury trial, and the court ordered a trial on the special issue (R. 185), following which it concluded that no dispute of fact had appeared (R. 782-783, 787-788, 803), and it granted defendants' motions for a directed verdict (R. 805). Judgment was entered dismissing the complaint on the ground that the action was barred by the statute of limitations (R. 196, 199-200).

Summary of Argument

The complaint sets forth allegations indicating an intention to state a claim for relief under the Sherman Act. Nowhere in the complaint is there any allegation indicating an intention to state any claim for relief other than the ordinary treble damage suit authorized by the federal antitrust laws.

The damage for which plaintiff seeks recovery in this suit was sustained from fifteen to twenty years previous to the bringing of the suit, and many of the persons concerned have since died (R. 659). Since the applicable period of limitations is three years, plaintiff has desperately attempted to devise a theory to avoid the bar of the statute.

In its efforts to overcome the patently correct decision of the District Court, dismissing the action, plaintiff resorts to several erroneous conceptions of the nature of its claim.

The plaintiff contends:

First, that this is a "civil action in equity" (Br. 2, 11, 39).

Second, that the conspiracy itself "was a fraud upon plaintiff" giving rise to a claim for relief for fraud (Br. 9).

Third, that the claim is based "on allegations of a continuing conspiracy among the defendants" (Br. 3, 7, 22, 32), and that its claim is based upon a conspiracy and not upon the overt acts which caused it damage (Br. 8).

Fourth, that the conspiracy was fraudulently concealed from it by defendants (Br. 6).

Based on the foregoing erroneous conceptions, plaintiff contends that (1) the time within which the suit must be commenced is not governed by any statute of limitations, but that the doctrine of laches is applicable (Br. 9, 36-39), and (2) if any statute of limitations is applicable, it does not commence to run until the completion of the last overt act which it contends did not occur until 1945 (Br. 9).

This defendant contends that:

1. The present action is not an action for equitable relief but an action at law for damages predicated upon a liability created by statute.

2. A conspiracy for violation of the antitrust laws does not give rise to either a suit in equity or an action based on fraud.

3. A civil action for treble damages under the antitrust laws is not based on a conspiracy.

4. The applicable statute of limitations is Section 338 Subdivision 1 of the California Code of Civil Procedure, and not Subdivision 4 thereof.

5. The causes of action accrued more than three years before the commencement of this action and are therefore barred by the statute of limitations.

6. There was no fraudulent concealment of plaintiff's cause of action which would toll the statute of limita-

tions. Furthermore, plaintiff failed to properly plead fraudulent concealment.

7. There was no error in the District Court's presentation of the special issue, nor in directing a verdict for the defendants.

In order that the real issues in the case, as determined by the District Court, may be clearly presented, it is first desirable to state the basic principles governing treble damage actions under the federal antitrust laws, which will clearly establish that plaintiff's conceptions are erroneous.

I.

A CIVIL ACTION FOR TREBLE DAMAGES UNDER THE ANTITRUST LAWS IS NOT BASED ON A CONSPIRACY.

The law is clearly established that a civil action for treble damages under the federal antitrust laws is *not* based upon the conspiracy. A conspiracy to restrain trade and commerce in violation of the antitrust laws does not in and of itself give rise to a private cause of action. Such right is based solely upon *damage* caused plaintiff pursuant to the conspiracy.

> *Nalle* v. *Oyster,* 230 U. S. 165, (1913);
> *Alexander Milburn Co.* v. *Union Carbon & Carbide Corp.,* 15 F. (2d) 678, (C. C. A. 4th, 1926), cert. den. 273 U. S. 757;
> *Glenn Coal Co.* v. *Dickinson Fuel Co.,* 72 F. (2d) 885 (C. C. A. 4th, 1934);
> *Foster & Kleiser Co.* v. *Special Site Sign Co.,* 85 F. (2d) 742 (C. C. A. 9th, 1936), cert. den. 299 U. S. 613.

In *Glenn Coal Co.* v. *Dickinson Fuel Co., supra,* the court said:

> "A mere conspiracy with intent to violate the law while it may be the basis of a valid indictment under the criminal sanction of the Antitrust Act, does not give rise to a personal civil suit for damages."

A plaintiff's right of action for violation of the Sherman Act is based not on the conspiracy, but on the acts causing him damage which are done pursuant to the conspiracy. As this Court stated in *Foster & Kleiser Co.* v. *Special Site Sign Co., supra,* at pages 750-751:

> "In a civil action for damages sustained because of a conspiracy in restraint of trade, the right of recovery is not based upon the conspiracy, but upon the injuries resulting thereform. The fact that there may be a criminal conspiracy does not give a plaintiff an action for damages under section 7 of the antitrust law, 15 U. S. C. A. Section 15 note, supra. *Glenn Coal Co.* v. *Dickinson Fuel Co.* (C. C. A.) 72 F. (2d) 885; *Strout* v. *United Shoe Machinery Co.* (D. C.) 208 F. 646, 651. The gist of the action under this section is for injuries inflicted pursuant to the conspiracy for which the wrongdoer is liable. *Morris & Co.* v. *Nat'l Ass'n of Stationers* (C. C. A.) 40 F. (2d) 620."

The following cases also illustrate these principles in civil actions for violation of the antitrust laws:

> *Alexander Milburn Co.* v. *Union Carbon & Carbide Corp., supra;*
> *Momand* v. *Universal Film Exchange,* 43 F. Supp. 996, 1007 (D. C. Mass. 1942).

In Point V (Br. 32-36) plaintiff contends that the complaint charged a continuing conspiracy, and it cites several cases which discuss *criminal* conspiracies. The authorities cited above show the irrelevancy of the entire argument under this point. It is immaterial whether there was a continuing conspiracy which the government could prosecute, as a private party obtains no rights thereby. The mere fact that the conspiracy may have continued subsequent to the

time of the alleged damage does not toll the statute, nor extend the time within which the action must be brought.

The contention that a treble damage suit was not barred because the conspiracy alleged was a continuing conspiracy under the rule of *U. S.* v. *Kissel*, 218 U. S. 601 (1910), was made to this Court in the *Foster & Kleiser* case, and conclusively disposed of. This Court correctly pointed out that the *Kissel* case was a criminal prosecution, and that in a civil action for damages sustained because of a conspiracy in restraint of trade, the right of recovery is not based on the conspiracy, but on the injuries resulting therefrom.

In *Momand* v. *Universal Film Exchange, supra,* the court, citing with approval the *Foster & Kleiser* case, said at page 1006:

> "But the situation is different where, as here, the plaintiff alleges that the defendants have continuously until the date of the trial, violated the anti-trust laws and those continuous violations have at different times invaded the plaintiff's legally protected interest. . . . Each time the plaintiff's interest is invaded by an act of the defendants, he has a new cause of action."

The court went on to point out that in view of these principles plaintiff's allegation that the conspiracy continued up to the date of the filing of the complaint was not controlling and said:

> "Even though 'a conspiracy . . . is in effect renewed during each day of its continuance' . . . no private civil cause of action accrues from the mere conspiracy itself because standing alone a conspiracy does not invade any private rights . . . Thus, *in private suits the existence of the conspiracy as such is not the critical question in computing the period of limitation* . . . The critical question is on what date or dates the defendants invaded the plaintiff's interest . . ." (Italics ours)

In *Twin Ports Oil Co.* v. *Pure Oil Co.*, 46 F. Supp. 149 (D. C. Minn. 1942) at 152, it was said:

> "At the outset, it must be recognized that, in every violation of the Sherman Act, there is no legal or logical inference that someone has sustained recoverable damages in a civil action. A conspiracy under the Act may afford the Government the right to injunction or to the prosecution of criminal proceedings, but it does not necessarily follow that everyone who did business with the conspirators during the period were damaged, so as to enable them to recover in a civil proceeding."

Plaintiff complains that the District Court "ignored the conspiracy of 1929 which is the sole and exclusive cause of action relied upon," and changed it to "several other causes of action based upon the overt acts alleged" (Br. 8).

In so ruling the District Court was following the law that in private actions under the antitrust laws the plaintiff has no cause of action unless it has been damaged by an overt act or acts done by defendants pursuant to the conspiracy.

> *Nalle* v. *Oyster, supra;*
> *Alexander Milburn Co.* v. *Union Carbon & Carbide Corp., supra;*
> *Glenn Coal Co.* v. *Dickinson Fuel Co., supra;*
> *Foster & Kleiser Co.* v. *Special Site Sign Co., supra.*

II.

A CONSPIRACY IN VIOLATION OF THE ANTITRUST LAWS DOES NOT GIVE RISE TO EITHER A SUIT IN EQUITY OR AN ACTION BASED ON FRAUD.

In a further effort to avoid the bar of the statute of limitations, plaintiff contends that the "1929 conspiracy was a fraud upon plaintiff" (Br. 9). By pleading fraud and claiming ignorance of the fraud, it attempts to bring the case within the rule that the statute of limitations does not begin to run on an action for fraud until it is discovered (Br. 20-21). This very point was specifically decided in the *Foster &*

Kleiser case, *supra,* where this Court held that the gravamen of an action brought under the provisions of the Sherman Act was not fraud.

Another case which also clearly holds that the gravamen of a cause of action under the Clayton Act and Sherman Act is not fraud is *State of Oklahoma* v. *American Book Co.*, 144 F. (2d) 585, 587 (C. C. A. 10th, 1944), in which the court said, at page 587:

> "The action in behalf of private persons was to recover treble damages under the Federal Antitrust Act. It was predicated upon a liability created by statute. . . . . The period of limitations for such an action is three years . . . . The running of the statute was not tolled by the non-discovery of the claim. *The claim was not one for fraud within the meaning of 12.O.S. 1941 Section 95* (3)." (Italics ours.)

Plaintiff cites no authorities to support its mere assertion that its cause of action is "in equity". For more than 50 years it has been settled that private actions arising under the Sherman Act are actions at law and not suits in equity.

In *Fleitmann* v. *Welsbach Co.*, 240 U. S. 27 (1916), the question was whether an action to recover treble damages was an action in equity or at law. The court, speaking through Mr. Justice Holmes, said (pp. 28, 29):

> ". . . . we agree with the courts below that when a penalty of triple damages is sought to be inflicted, the statute should not be read as attempting to authorize liability to be enforced otherwise than through the verdict of a jury in a court of common law. On the contrary it plainly provides the latter remedy and it provides no other."

See also *Williamson* v. *Columbia Gas & Electric Co.*, 110 F. (2d) 15 (C. C. A. 3rd 1939) *cert. den.* 310 U. S. 639 (1940). Treble damage suits being actions at law, the parties have a right to a trial by jury. *Meeker* v. *Lehigh Valley R. Co.*, 162 Fed. 354 (C. C. N. Y. 1908); *Columbia River Packers Assn.* v.

Minton, 34 F. Supp. 970 (D. C. Oregon 1940), rev'd on other grounds 117 F. (2d) 310, rev'd on other grounds 315 U. S. 143; *Farmers Co-operative Oil Co.* v. *Socony Vacuum Oil Co.,* 43 F. Supp. 735 (D. C. Iowa 1940), modified on other grounds 133 F. (2d) 101.

Despite this clear and unambigous series of holdings, the plaintiff has attempted, by use of the word "fraud", to place this case on a different footing from other treble damage suits. It hopes by the use of the word "fraud" in the complaint to transform an action at law into an equitable action. It overlooks the rule that the test is the type of relief demanded—a suit for damages is a suit at law even though the cause of action be fraud. See the excellent discussion on this point in *Philpott* v. *Superior Court,* 1 Cal. (2d) 512, 36 P. (2d) 635. The plaintiff itself has never been very clear as to the nature of its action. Its counsel admitted in argument below that an action for damages under the antitrust laws was not an action for fraud (R. 795).

The case upon which plaintiff principally relies on this appeal, *Holmberg* v. *Armbrecht,* 327 U. S. 392 (1946), was a class suit to enforce an equitable right given by a federal statute, viz., double liability of bank stockholders (Br. 9, 37). The class suit was a remedy available only in equity [See *Wheeler* v. *Greene,* 280 U. S. 49 (1929); *Christopher* v. *Brusselback,* 302 U. S. 500 (1938); *Russell* v. *Todd,* 309 U. S. 280, 285 (1940)]. Not only is the *Holmberg* case obviously irrelevant, but the Court in its opinion, at p. 395, specifically cited a treble damage suit under the antitrust laws, *Chattanooga Foundry and Pipe Works* v. *Atlanta,* 203 U. S. 390 (1906), as the type of case about which it was *not* talking. That type of case, said the Court, is governed by the applicable state statute of limitations.

The authorities cited above under Point I indicate the true nature of the cause of action. The District Court correctly ruled that the action was not based on fraud (R. 795).

III.

THE THREE YEAR STATUTE OF LIMITATIONS SET FORTH IN SECTION 338, SUBDIVISION 1 OF THE CALIFORNIA CODE OF CIVIL PROCEDURE IS APPLICABLE.

Plaintiff makes the preposterous contention that *no statute of limitations at all* is applicable to its suit (Br. 36-39). It contends "that the state statute of limitation has no application to the instant case" (Br. 11, 36); "There is no federal statute of limitations applicable" (Br. 37); "it was an error of the Court to apply the statute of limitations" (Br. 38); and "The doctrine of laches is therefore applicable" (Br. 39). No cases arising under the antitrust laws are cited, and the cases which plaintiff does rely upon are not even remotely relevant.

The antitrust laws of the United States do not contain any statute of limitations. In such cases it is settled law that the applicable statute of limitations is that of the state where the federal district court in which the action is brought is situated.

Chattanooga Foundry and Pipe Works v. *Atlanta, supra;*

Foster & Kleiser Co. v. *Special Site Sign Co., supra;*

Bluefields S. S. Company v. *United Fruit Company,* 243 Fed. 1 (C. C. A. 3rd, 1917) writ of error dismissed 248 U. S. 595;

Ben C. Jones & Co. v. *West Publishing Co.,* 270 Fed. 563 (C. C. A. 5th, 1921) writ of errors dismissed 270 U. S. 665;

State of Oklahoma v. *American Book Co., supra; Momand* v. *Universal Film Exchange, supra.*

The California Code of Civil Procedure provides in part as follows:

Section 312:

> "Civil actions, without exception, can only be commenced within the periods prescribed in this title, after the cause of action shall have accrued, unless where, in special cases, a different limitation is prescribed by statute."

Section 335:

> "The periods prescribed for the commencement of actions other than for the recovery of real property, are as follows:"

Section 338:

> "Within three years:
>
> 1. An action upon a liability created by statute, other than a penalty or forfeiture. . . ."

The causes of action set forth in the complaint are based upon the provisions of the Sherman Act, and it is this statute which gives plaintiff its alleged claims for relief for treble damages.

This Court has specifically held in the *Foster & Kleiser* case that in an action to recover treble damages under the Sherman Act

> "The applicable statute of limitations is section 338, subd. 1, Cal. Code Civ. Proc. which provides for a three-year limitation upon a claim based upon a statutory liability." (p. 750)

The Circuit Court of Appeals for the 10th Circuit and the district courts in New York and Massachusetts have also held that actions under the Sherman Act are actions "upon a liability created by statute" within the meaning of these words in a state statute.

State of Oklahoma v. *American Book Co. supra;*
Hansen Packing Co. v. *Swift & Co.* 27 F. Supp. 364, 367 (D.C. S.D. N.Y. 1939);
Momand v. *Universal Film Exchange, supra.*

It follows, therefore, from the provisions of section 312 and section 338, subdivision 1, of the Code of Civil Procedure, that plaintiff's cause of action is barred unless it was commenced within three years after the cause of action accrued.

Nowhere in its brief does plaintiff discuss the applicable statutes or the cases above cited, although they were cited to the District Court and relied upon in its decision.

IV.

THE CAUSES OF ACTION ACCRUED MORE THAN THREE YEARS BEFORE THE COMMENCEMENT OF THIS ACTION AND ARE THEREFORE BARRED BY THE STATUTE OF LIMITATIONS.

Under federal law it is very clear that a cause of action for damages for violation of the Sherman Act accrues when the damage is sustained by the plaintiff. As stated in the *Foster & Kleiser* case, *supra,* at page 750:

> *"The cause of action arises when the damage is sustained and the statute of limitations begins to run at that time. Bluefields S. S. Co.* v. *United Fruit Co.* (C. C. A.) 243 Fed. 1, 20."
>
> "Under this decision, in a civil action for damages under the Sherman Anti-Trust Act, a plaintiff may recover only such damages as have been sustained within the applicable period of limitations immediately proceding the filing of the action." (Italics ours).

The cause of action here accrued not later than January 1929, or sixteen and one-half years before suit was brought. This suit was filed July 3, 1946.

Plaintiff's alleged cause of action is predicated on damage allegedly suffered on two occasions.

First, in 1924 and 1925, when defendants allegedly conspired to have the Post Office Department issue an order preventing the plaintiff from using the mails (Complaint para. 73); second, in 1928, when defendants pursuant to the conspiracy allegedly reduced the price of borax below plaintiff's costs of production, as a result of which plaintiff was allegedly driven out of business at the end of 1928 or in January 1929 (Complaint paras. 73, 76).

In this case the acts from which the plaintiff alleges it sustained damages occurred in 1925 and 1928, respectively. Its plant closed down in 1929. Under the *Bluefields* case, the statute would have begun to run in 1928.

The "overt act" alleged as the defendants' opposition to plaintiff's attempt to secure a lease on the so-called "Little Placer" claim is not alleged as a source of damage to the plaintiff. The only damage claimed is that itemized in paragraph 76 of the complaint.

No damages could have resulted from the action of the Department of the Interior in denying the plaintiff a lease on the "Little Placer" claim, for the decision of a government official acting within the scope of his powers is an act of the sovereign and cannot be unlawful. In *American Banana Company* v. *United Fruit Co.,* 166 Fed. 261 (1908), the court dismissed a treble damage suit under the antitrust laws wherein it was alleged that Costa Rican officials had been instigated by the defendant to do certain acts damaging to the plaintiff. In affirming the judgment, *American Banana Company* v. *United Fruit Company,* 213 U. S. 347 (1909), the Supreme Court, per Mr. Justice Holmes, said:

> "The fundamental reason why persuading a sovereign power to do this or that cannot be a tort is that it is a contradiction in terms to say that within its jurisdiction it is unlawful to persuade a sovereign power to bring about a result that it declares by its conduct to be desirable and proper . . . It makes the persuasion lawful by its own act."

The case of *Buckeye Powder Co.* v. *du Pont de Nemours Powder Co.,* 248 U. S. 55 (1918), is particularly in point. In that case the lower court had held that there could be no recovery for damage suffered more than six years before the beginning of the suit, September 18, 1911, even though the government had secured an injunction against the conspiracy as a continuing conspiracy in June 1911 (188 Fed. 127 (C. C. D. Del. 1911)). The Supreme Court affirmed, dismissing the plaintiff's contentions in a summary opinion by Mr. Justice Holmes.

The fact that the conspiracy may have continued in so far as government indictment was concerned does not give Burnham an action for damage suffered long before, any more than it did the plaintiff in the *Buckeye* case. He had the option of suing before the statute of limitations expired, and employing a bill of discovery to secure his evidence. *Loft, Inc.* v. *Corn Products Refining Co.,* 103 F. (2d) 1 (C. C. A. 7th, 1939), cert. den.; *Corn Products Refining Co.* v. *Loft, Inc.,* 308 U. S. 558 (1940); *Baush Machine Tool Co.* v. *Aluminum Co. of America,* 63 F. (2d) 778 (C. C. A. 2d. 1933), cert. den. 289 U. S. 739 (1933). If the plaintiff chose to use its funds in complaining to other authorities than the courts of the United States (R. 661), it cannot now complain.

Since the cause of action is not based upon the conspiracy, the statute runs from the date the damage was sustained, or from the date of the last overt act causing that damage to the plaintiff, whichever first occurs. *Momand* v. *Universal Film Exchange, supra.* It follows that the cause of action accrued not later than 1929, and is barred by the statute of limitations.

The contention that the complaint alleged a continuing conspiracy, and that neither laches nor the statute of limitations began to run until completion of the last overt act in 1945 is untenable (Br. 9). It has already been demonstrated that plaintiff's cause of action is not based upon the conspiracy. And there is no contention or allegation that plaintiff was damaged by any overt act after 1929.

V.

SECTION 338(4) OF THE CALIFORNIA CODE OF CIVIL PROCEDURE IS NOT APPLICABLE.

Without surrendering its contention that no statute of limitations at all is applicable, plaintiff contends that (a) the conspiracy was a fraud upon it, (b) which was fraudulently concealed by the defendants, and that neither the statute of limitations nor laches began to run until its discovery of the existence of the conspiracy (Br. 9, 38). Plaintiff contends that if any statute of limitations is applicable, it is Section 338(4) of the Code of Civil Procedure (Br. 17).

Section 338(4) reads as follows:

> "Within three years . . .
> An action on the ground of fraud or mistake. The cause of action in such case not to be deemed to have accrued until discovery, by the aggrieved party, of the fact constituting the fraud or mistake."

As pointed out above, this Court specifically stated in the *Foster & Kleiser* case, *supra,* that Section 338(4) is not applicable to a treble damage suit.

VI.

THE DISTRICT COURT CORRECTLY HELD THAT THE PLAINTIFF FAILED TO PROVE THE CHARGE THAT ITS CAUSE OF ACTION HAD BEEN FRAUDULENTLY CONCEALED BY THE DEFENDANTS.

The defendants moved to dismiss on the ground that the action was barred by the statute of limitations (R. 55, 72, 89, 95). After a trial on the special issue the District Court directed a verdict for the defendants (R. 196, 806) and

granted the motions to dismiss (R. 199). The Court held that the plaintiff had a continued awareness and knowledge of its cause of action from 1925 to 1940 (R. 803).

1. Defendants owed no duty to plaintiff to disclose to it the existence of the alleged conspiracy.

Since Section 338(4) is not applicable, cases cited by plaintiff on the question of "discovery" of fraud are irrelevant. However, the California Courts have held that where defendant has "fraudulently concealed" from plaintiff the facts upon which the cause of action depends, the running of the statute of limitations is suspended until plaintiff discovers the facts or until he has knowledge of facts sufficient to put a reasonably prudent person on inquiry.

Kimball v. *Pacific Gas & Electric Co.* 220 Cal. 203, 30 P. (2) 39 (1934);

Pashley v. *Pacific Electric Company,* 25 Cal. (2) 226, 153 P. (2) 325 (1944);

Bollinger v. *National Fire Insurance Co.* 25 Cal. (2) 399, 154 P. (2) 399 (1944);

Hobart v. *Hobart Estate Co.* 26 Cal. (2) 412, 159 P. (2) 958 (1945);

Hansen v. *Bear Film Co.* 28 Cal. (2) 154, 168 P. (2) 946 (1946);

Bowman v. *McPheeters,* Cal. App. 175 P. (2) 745 (1947).

The California cases also hold, however, that mere failure by a defendant to disclose to plaintiff the existence of the facts upon which the cause of action is based, does not constitute "fraudulent concealment" of the cause of action unless defendant is under a duty to disclose these facts.

Pashley v. *Pacific Electric Co. supra;*
Kimball v. *Pacific Gas & Electric Co., supra,* (p. 45).

See also *Bryan* v. *United States,* 99 F. (2d), 549, 553, (C. C. A. 10th, 1938) cert den. 305 U. S. 661, and cases cited therein at note 11.

The plaintiff bases its contention that its cause of action was fraudulently concealed on two conversations of Burnham in 1929, one with the late C. B. Zabriskie, general manager of Pacific Coast Borax, and the second with H. S. Emlaw, president of American Potash & Chemical Corporation, in which, according to Burnham's statement, each of them denied that the defendants had conspired to cut prices on borax in 1928, with the intention of putting the plaintiff out of business (R. 359, 362). Burnham testified that the denials of Zabriskie and Emlaw dispelled his belief that he had a cause of action but the District Court found that this testimony could not carry any weight when opposed to the mass of evidence to the contrary (R. 803-804).

The District Court very correctly took the attitude that a mere denial of a tort is not fraudulent concealment thereof such as will toll the statute of limitations. Here there was no relationship between the plaintiff and the defendants, or any other special facts which would place the defendants under the duty of disclosing their corporate transactions. Thus there existed a relationship of physician-patient in *Bowman* v. *McPheeters, supra,* and *Pashley* v. *Pacific Electric Co., supra;* of administratrix-heir-at-law in *Hansen* v. *Bear Film Co., supra;* and of employer-employee in *Kimball* v. *Pacific Gas and Electric Co., supra.*

When defendant has merely failed to disclose to plaintiff the existence of the cause of action, as defendants are alleged to have done in this case, his duty to disclose will arise only if there exists a confidential relationship between plaintiff and defendant which relationship imposes on defendant the duty of disclosure.

> *Scafidi* v. *Western Loan and Building Co.* 72 Cal. App. (2) 550, 165 P. (2) 260 (1946);
> *Strout* v. *United Shoe Machinery Co.* 208 Fed. 646 (D.C. Mass. 1913).

When, however, there is no such special relationship between the parties as to impose upon defendant the duty of disclosing the facts upon which the cause of action is based, then the statute is not suspended merely by reason of plaintiff's ignorance of, or failure to discover, the existence of the cause of action.

> *Lattin* v. *Gillette,* 95 Cal. 317, 30 P. 545 (1892);
> *Lambert* v. *McKenzie,* 135 Cal. 100, 67 P. 6 (1901);
> *Medley* v. *Hill,* 104 Cal. App. 309, 285 P. 891 (1930);
> *Scafidi* v. *Western Loan & Building Co., supra;*
> *Neff* v. *National Life Insurance Co.,* 30 Cal. (2) 161, 180 P. (2) 900 (1947).

In the *Foster & Kleiser* case, *supra,* this Court stated, at p. 752,

> ". . . when fraud is not the gravamen of the action, in order to toll the applicable statute of limitations, two factors must be present: (1) Fraudulent concealment; (2) non-discovery, that is, absence of facts that would put a party upon notice of the cause of action. Mere ignorance of the injury complained of, or of the facts constituting such injury will not prevent the running of the statute".

2. Plaintiff failed to properly allege fraudulent concealment.

Even if the theory of fraudulent concealment could be applied to a treble damage suit under some conceivable circumstances, the complaint alleges no facts which make it applicable to these causes of action. The sole allegations are the *conclusions* (1) that the defendants "fraudulently concealed" from plaintiff its cause of action, and (2) that the plaintiff did not "discover" this fact until the Government instituted suits.

In order to prevent the running of the statute of limitations plaintiff must *plead* and prove facts establishing fraudu-

lent concealment; the fraudulent concealment must be of facts upon which the existence of the cause of action depends; *facts* must be alleged from which the court may conclude the date of "discovery"; and plaintiff must allege *facts* which establish that they could not have made the "discovery" earlier by the exercise of ordinary diligence.

> *Vertex Investment Co.* v. *Schwabacher,* 57 C. A. (2d) 406, 134 P. (2d) 891, (1943);
>
> *Lady Washington Consolidated Co.* v. *Wood,* 113 Cal. 482, 486, 45 P. 809 (1896);
>
> *Wood* v. *Carpenter,* 101 U. S. 135, 140 (1879);
>
> *Johnson* v. *Ehrgott,* 1 Cal. (2d) 136, 34 P. (2d) 144, (1934);
>
> *Myers* v. *Metropolitan Trust Co.,* 22 C. A. (2d) 284, 70 P. (2d) 992, 1937).

The only allegation of fraudulent concealment in the complaint which could be relied on by the plaintiff on this appeal is the charge in paragraph 75 that in May 1929, Mr. Zabriskie denied that the defendants had conspired to cut prices on borax in 1928 with the intention of putting plaintiff out of business, and that these assurances dispelled his belief that he had a cause of action.

In *Feak* v. *Marion Steam Shovel Co.,* 84 F. (2d) 670 (C. C. A. 9, 1936), cert. den. 299 U. S. 604 (1936), the court stated:

> "Restatements of the fraudulent representation do not of themselves constitute concealment, and *where a party is once put upon notice of fraud he cannot avoid the consequences of his constructive knowledge of the fraud nor fulfill his duty to investigate by going to the party he suspects of the fraud. He cannot desist from further investigation because he is reassured of the truth of the original representations.* Brackett v. Perry, 201 Mass. 502, 87 N. E. 903; see also Sioux City & St. P. Ry. Co. v. O'Brien (1902) 118 Iowa 582, 92 N. W. 857." (italics ours)

To the same effect, that after a person suspects that a wrong has been perpetuated on him, he cannot stop the running of the statute by going to the alleged wrongdoer and obtaining assurance that no wrong was committed, see

Turman v. *Holmes,* 29 C. A. (2d) 198.

The only allegation in the complaint upon which the plaintiff predicates its claim of "discovery" of its cause of action is the commencement of actions by the Government against these defendants on September 14, 1944. Consequently, the only *fact* which the plaintiff has to rely on is that the Government *accused* the defendants of violating the antitrust laws. This did not provide the plaintiff with any greater means of discovery than it apparently possessed at the time Burnham made his inquiry of Mr. Zabriskie.

The rules requiring diligence of "discovery" and necessity of pleading facts of "non-discovery" apply not only to "fraud" which is the gravamen of a cause of action but equally well to alleged concealment. *Foster & Kleiser Co.* v. *Special Site Sign Co., supra.* The alleged statement by Mr. Zabriskie was made, so the complaint says, in May 1929. Sixteen years elapsed between that date and filing of suit. Yet plaintiff alleges no facts whatever why it did not discover alleged falsity of the statement during that period. Indeed, it does allege (para. 73, p. 34, l. 13) that after 1929 defendants increased the price of borax, a circumstance apparently inconsistent with Mr. Zabriskie's alleged statement, and a circumstance which ought to have renewed the original suspicion.

3. There Was No Error in the District Court's Ruling Directing a Verdict for the Defendants.

We submit that the District Court, in framing the question to be considered at the special trial, fairly summed up the California rule when it put it as follows:

> "At any time from May 17, 1929, to October 10, 1939, did plaintiff know or have good cause to believe

> that its business had been theretofore damaged by acts of the defendants in violation of the Anti-Trust Laws of the United States?"

"Know or have good cause to believe" is a fair statement of the state of mind required to bar the plaintiff, elsewhere described as being "put on notice of the cause of action", "by reasonable diligence . . . should have discovered the facts", "actual or presumptive knowledge of facts sufficient to put him on inquiry". Indeed, if anything the District Court's formulation in this case was more favorable to the plaintiff that it should have been.

> *Foster & Kleiser Co.* v. *Special Site Sign Co., supra;*
> *Original Mining and Milling Co.* v. *Casad,* 210 Cal. 71; 290 P. 456-457;
> *Kimball* v. *Pacific Gas & Electric Co., supra.*

The evidence presented at the special trial established no dispute of facts; therefore the District Court properly directed a verdict for the defendants.

The testimony of the witness Burnham on cross-examination showed that as early as 1926, the plaintiff, in a complaint filed by it against the postmaster at Reno, Nevada, alleged that these defendants exercised a "monopolistic restraint of the commerce in borax" which "was and is a flagrant violation of the laws of the United States, and could and should be prohibited by criminal and civil proceedings instituted by the United States" (R. 420), and further alleged that the Post Office Department "Fraud Order" which hampered the plaintiff's financing was obtained as part of the conspiracy to restrain trade. Burnham had been informed by certain of his stockholders that the "Fraud Order" had been inspired by his competitors (R. 429-432). Even earlier, in 1923, Burnham had written to the Post Office inspector investigating the Burnham company, alleging that the defendants were attempting to hinder its development (R. 453-454), and declining to furnish a list of its stockholders because of the "active

oppositon" interested in preventing the success of the enterprise (R. 458).

The allegation of the plaintiff in this action that the "Fraud Order" was inspired by a Pacific Coast Borax official then in the service of the Federal Government was based on knowledge acquired in 1926 (R. 482) and was also included in a letter to the Secretary of the Interior in 1939 (R. 487). Burnham believed in 1929, at the time of his conversation with Mr. Zabriskie which he alleges was a concealment of his cause of action, that the official had inspired the "Fraud Order" for the benefit of the defendants (R. 499-500).

As to the price cuts instituted by the defendants in June, 1928, which the plaintiff alleges drove it out of business, one of its attorneys wrote in July, 1928, that he was inclined to think that the price competition was "in fact designed by the controlling heads of these two concerns (and which are located in England) for the express purpose of killing off threatened competition" (R. 511). In a memorandum to Burnham, based on thorough research, this attorney concluded that it was "quite evident" that the price reductions were the "natural and inevitable result, and therefore the very object and purpose, of trade practices which are in violation of the Federal Trade Commission Act, also the Federal Anti-trust Laws" (R. 519).

The plaintiff wrote to its stockholders expressing the opinion that the price cuts of 1928 were intended to drive it out of business (R. 524-525), and wrote to Pacific Coast Borax Co. proposing that the latter assist it in suing American Potash and Chemical Corporation (R. 532). The refusal of Pacific Coast Borax to assist in such a suit "added belief or suspicion" in Burnham's mind that the two companies were cooperating to cut the price and drive Burnham out of business (R. 535).

Burnham continued throughout the 1930's to entertain his belief that the defendants were conspiring against him. In 1933, the denial of his application for a lease of borate lands "led him to believe" that probably defendants or some

of them were violating the anti-trust laws (R. 574). In 1934 further purchases of borax property by Pacific Coast Borax stimulated him to look into the possibility of complaining to Congress (R. 574-581), and his attorney wrote to a Department of the Interior investigator about the "evil and strangling monopoly" established by Pacific Coast Borax (R. 585). In 1936 he wrote to Senator Pittman, chairman of Senate sub-committee investigating the potash industry, alleging that the "English Borax Trust" had been responsible for driving him out of business. In 1934 he wrote to the Secretary of the Interior, repeating his complaints and stating that the "main object" of Pacific Coast Borax was "to get patent to sodium borate lands and to drive out all competition and hold a monopoly of the borax business." (R. 603). In 1938 his belief was revived by the reinstatement of the fraud order and other circumstances (R. 609-610) and he made plans to publish accounts of his difficulties (R. 610-611). He consulted an attorney, who advised him that so far as any damage sustained from the price-cutting of 1928 was concerned, his claim was outlawed (R. 614-615).

In 1939, he again wrote to the Secretary of the Interior, referring to the "formidable monopoly" of the defendants (R. 619) and on November 22, 1939 wrote to the Department of Justice, stating that the defendants constituted the "British Borax Trust" and "practically" controlled the price of potash and borax in America (R. 399); that they had conducted a price war in 1928 which the witness was convinced was "aimed purposely to destroy" the plaintiff, and that the plaintiff's attorneys felt that it "had a case against the Trust for violating the Sherman Anti-trust Laws" (R. 400). In 1940 Burnham pointed out that "for some time I have talked about the British-owned potash and borax interests getting most of the potash and borax deposits in this country and driving out American competition." (R. 655). Yet despite all of these accusations the plaintiff never instituted legal action to recover for its alleged injuries, because what money it had "was sent to us by our stockholders for other purposes" (R. 661).

Summarizing the evidence, it appears that whether the defendants herein attempted to fraudulently conceal from plaintiff its cause of action or not, there can be no doubt that the plaintiff discovered it many years before it filed its complaint, if indeed it was ever deceived. Plaintiff and its president, Burnham, repeatedly told the stockholders that it was the victim of a conspiracy in violation of the antitrust laws; sponsored articles which were to tell the public that; communicated with members of Congress to that effect, wrote the Secretary of the Interior, and complained to the Antitrust Division of the Department of Justice. It cannot now be heard to say that it was fraudulently deceived into believing that it had no cause of action, when for twenty years it pressed its case upon every conceivable opportunity.

In the light of all these facts, there can be no doubt that the plaintiff, throughout the period from 1929 on, not only had reason to believe, but did believe, that it had a cause of action against the defendants. Its attorneys so believed and so advised it. The District Court found quite correctly that Burnham's statements that he had no knowledge or cause for belief, even if admissible, could not conceivably permit of an interpretation contrary to the accumulated mass of written and sworn statements over the period in question. As the Court said, "no mere lip service to the contrary can rise to the dignity of creating a factual conflict" (R. 803). The Court was therefore correct in finding that the plaintiff knew or had cause to believe, for many years prior to 1944, that it had a cause of action against the defendants for damage to its business resulting from violations of the antitrust laws of the United States. It necessarily followed that suit on the cause of action was barred by the statute of limitations and that judgment was correctly entered for the defendants.

There can be no question that, on the evidence presented below, a verdict for the plaintiff, on the question of fact which was made the subject of the special trial, would not have been warranted, and if such a verdict had been rendered, the defendant would have been entitled to a new trial. The District

Court was therefore correct in directing a verdict for the defendants on this issue, under the long-established rule of the Federal courts.

Brady v. *The Southern Railway Company,* 320 U. S. 476 (1943);
Farr Company v. *Union Pacific Railroad,* 106 F. (2d) 437 (C. C. A. 10, 1939);
National Mutual Casualty Company v. *Eisenhower,* 116 F. (2d) 891 (C. C. A. 10, 1940);
Mutual Benefit Life Insurance Company v. *Snyder,* 109 F. (2d) 469 (C. C. A. 6, 1940);
Oklahoma Natural Gas Company v. *McKee,* 121 F. (2d) 583 (C. C. A. 10, 1941);
Barrett v. *Virginian Ry. Co.,* 250 U. S. 473, 476 (1919).

CONCLUSION

The judgment of the District Court should be affirmed.

Respectfully submitted,

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